

## Cabinet News and Views

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### CFTC Enforcement Focus on DeFi



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The CFTC [has announced](#) three enforcement actions this month that further cement the CFTC’s jurisdiction over the decentralized finance space (“DeFi”). Back in 2022, the CFTC filed its first DeFi cases, including the [Polymarket enforcement action](#) and the [Ooki DAO enforcement action](#) where the CFTC alleged for the first time that DeFi platforms as well as decentralized autonomous organizations (“DAOs”) could be deemed a “person” under the Commodity Exchange Act of 1936 (“CEA”) and would therefore be subject to CFTC’s regulations.

This month’s three enforcement actions, involved operators of DeFi platforms, specifically [Oryn, Inc.](#), [ZeroEx, Inc.](#), and [Deridex, Inc.](#) each of which the CFTC has alleged to be engaged in offering illegal digital asset derivatives trading. With respect to these actions, Director of Enforcement, Ian McGinley remarked, “Somewhere along the way, DeFi operators got the idea that unlawful transactions become lawful when facilitated by smart contracts. They do not. The DeFi space may be novel, complex and evolving, but [we] will continue to evolve with it and aggressively pursue those who operate unregistered platforms that allow U.S. persons to trade digital asset derivatives.”

McGinley later [provided comments](#) at the Practising Law Institute’s White Collar Crime conference on (September 11, 2023) summarizing the enforcement actions and explaining that “[e]ach of these three platforms was offering and confirming off-exchange leveraged or margined retail commodity transactions ... [and] we will do everything in our power to ensure that digital asset commodity transactions that should be conducted on regulated derivatives exchanges are in fact conducted on those exchanges.”

Digging into the three enforcement actions, each of the orders identifies the following activities as being violations of the CEA:

- The DeFi platforms offered, or made available for trading, contracts that were based on various cryptocurrencies and digital assets, such as Ether. These contracts qualify as “commodities” under the CEA. The CFTC has enforcement jurisdiction over interstate transactions involving “commodities”.
- Some of the contracts offered on these platforms, no matter how sophisticated and novel they were (e.g., using smart contracts to effectuate the trades on the blockchain) qualified as “swaps”, as defined in § 1a(47) of the CEA (e.g., “perpetual” contracts without the delivery of a commodity), which gives the CFTC exclusive regulatory jurisdiction over their activities.
- Some of these commodity contracts were offered on leveraged basis, without actual delivery of a commodity within 28 days, to traders that did not qualify as “eligible commercial entities” or “eligible contract participants” as defined in § 1a(17) and (18), respectively of the CEA, and therefore these commodity contracts qualified as “retail commodity” contracts that are deemed to be “futures.”
- The platforms facilitated the trading of swaps on a platform that offered matching between multiple participants, which means such platform must be registered as a “swap execution facility” (“SEF”), and none of the three platforms were registered as such.
- The platforms also facilitated the trading of retail commodity contracts, which, again, are deemed to be futures contracts, and which must be traded only on a “designated contract market” (“DCM”), i.e., a registered commodity exchange. None of the three DeFi platforms were registered as DCMs.
- When any entity that acts as a broker or solicits for deposit assets (including digital assets) in connection with margined or leveraged retail commodity transactions, that entity must be registered as a futures commission merchant (“FCM”).
- None of the platforms had appropriate anti-money laundering controls in place, as required by the Bank Secrecy Act, and in the alternative, nor did the platforms have effective systems to prevent U.S. persons from trading on the platforms.

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